No. 19551

In the

United States Court of Appeals

For the Ninth Circuit

WEST LOS ANGELES INSTITUTE FOR CANCER RESEARCH, a corporation,
Appellant,

v.

WARD MAYER, MARJORIE MAYER, R. W. MAYER, and TIMBER STRUCTURES, INC., a corporation, individually and as successors in interest to WARD MAYER STRUCTURES, INC.,
Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court
for the District of Oregon
HONORABLE GUS J. SOLOMON, *Judge*

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The decision herein is in irreconcilable conflict with the findings of the trial court and the decisions of the Oregon and United States Supreme Courts. The holding is based upon misunderstanding of the facts and misapplication of the law.

I

Finding of Settlement. The Court erred in granting rescission based on an occurrence in 1954 in view of the finding of the trial court that the parties negotiated and concluded an enforceable settlement of their dispute in

1956. Settlement merges and extinguishes all antecedent claims. Any right to rescind based on the 1954 Revenue Ruling was merged in and extinguished by the 1956 settlement. Furthermore, the settlement agreement, which the trial court found was approved by the parties, expressly provided for "mutual releases" (Exh. 106).

II

Election. Appellant claims that plaintiffs failed to make a prompt election to rescind upon the occurrence of the frustrating event and thereby waived their right to this remedy. This Court erroneously considered the question one of waiver involving intention to surrender a right. When the word "waived" is used in the sense of election, "the requisite of even apparent intention to surrender a right is absent." 5 Williston, Contracts, 275 § 684 (3d Ed). The law simply does not permit a party to exercise two inconsistent rights. Sellers did not elect to rescind after the frustrating event in 1954. The trial court found that sellers in 1956 negotiated for and arranged a conveyance which provided for a payment of $50,000 plus attorney's fees, indemnity from taxes, and mutual releases. This finding of a choice by sellers inconsistent with rescission results in an election which barred rescission regardless of intention.

This Court considered cases on laches which are not applicable to the question of election. Injury to another,

change of position, or loss of evidence may be relevant to the question of timeliness of demand, but are not relevant to a choice of two inconsistent courses of action.

This Court failed to notice that plaintiffs, after the right to rescind arose, continued to treat the contract as binding, accepted payments under it, and sought to amend its terms—all acts which bar rescission.

Contrary to the record of wildly fluctuating earnings, this Court held that the business was not speculative, but in any event it failed to consider the principal "speculative delay" in which plaintiffs engaged; that is, whether they wanted the properties back if they had to pay a tax on repossession (Tr 172, 424, 457).

III

Unclean Hands. This Court correctly holds that Mayer's offense was serious and a violation of a vital public policy. The offense is correctly described as "deliberate concealment of significant facts from the taxing authorities." But only plaintiffs participated in the concealment, and the Court erroneously holds that the parties were not *in pari delicto*. The Court fallaciously discusses the *omission* of facts from the writing instead of *concealment* and fails to notice the rule that Seagraves' conduct cannot be imputed to the directors of the Institute.

Taylor v. Grant, 204 Or. 10, 279 P2d 479, 281 P2d 704 (1955), is not authority for disregarding the unclean hands disqualification against *one seeking rescission*. It is authority for the importance of the rule which requires return of consideration to the wrongdoer as a condition precedent to rescission—a rule which will not be defeated by the necessity of a second suit when the consideration could not initially be returned to the wrongdoer because it was in the hands of one not a party to the first suit. *Taylor v. Grant* supports appellant's claim that the consideration paid by defendant to sellers would have to be returned as a condition precedent. This Court failed to pass upon that specification of error.

This Court misstates that the trial court found that Mayer's motive was not to gain a tax advantage by concealing a relevant fact. No such finding was made. Such conclusion is precluded by Mayer's admission (Mayer's Dep'n, Exh. 151 pp. 42-3) and the admission in the pretrial order that the rescission agreement was made orally because if known "might undermine the *bona fides* of the whole transaction in the eyes of the Internal Revenue Service" (R. 226). The parties are bound by the pretrial order (3 Moore's Fed. Prac., 2d Ed., 1127) which in Oregon provides that upon filing "the pleadings pass out of the case and are superseded" (R. 287).

Oregon has never considered the unclean hands doctrine to require injury to adverse party, government or third party. In Oregon the rule "*is invoked as grounds of public policy and for the protection of the integrity of the court.*" *Taylor v. Grant*, 279 P.2d 479, 485. In the Federal courts the maxim is "self-imposed" without regard to behavior of the adverse party. See *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.*, 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381 (1945), where concealment of facts in a patent application barred relief even though the opponent was the active party in the concealment. This opinion herein is clearly in conflict with that decision of the United States Supreme Court.

IV

Modification of contract by inadmissible oral evidence. Contrary to the opinion herein, the trial court found that the risks of adverse tax consequences were foreseen by plaintiff (R. 315). The court relies on parol evidence of an oral agreement to conclude that the Institute assumed that risk. This evidence was inadmissible. The trial court found the oral agreement within the statute of frauds, and under the strict Oregon statute, evidence thereof was inadmissible. Oregon's likewise strict parol evidence rule also prohibited introduction of such evidence.

Although recognizing these rules, the trial court admitted the evidence for the purpose of aiding in inter-

pretation or construction of the written agreement. There was no ambiguity to interpret and *the court did not use the evidence to construe the written terms.* Instead, the trial court erroneously concluded that "Once this evidence was admitted, it is obvious that the entire agreement was not completely integrated." (Tr. 1197). The court then added the oral agreement as an additional term of the contract. This Court disregarded Oregon's face of the instrument test of integration and the statute of frauds' prohibition against admissibility. The issue is no less avoided because the Court said in footnote that the evidence was admissible to aid in interpreting the contract. There was no interpretation of any part of the written contract. The oral agreement was considered an additional contract term and made the keystone of this decision.

Contrary to this Court's opinion at page 6, the trial court did not find that the Mayers did not intend to assume the risks of adverse tax consequences. The trial court did find that because of the risks of adverse tax consequences, Ward Mayer wanted "an exculpatory clause written into the documents." (R. 315). This Court says that sellers "requested assurances that the property would be returned" in the event of adverse tax consequences. Such assurances would be requested for only one reason—that sellers had such risk and desired a remedy if it occurred. The promise of return

in the event sellers suffered the risk does not prove that sellers had no risk, but the contrary. Where plaintiffs seek and obtain protection by an oral agreement from adverse tax consequences, the occurrence of that planned for event is here said to be frustration. We respectfully submit that this gap in reasoning calls for re-analysis.

Where the disappointment is foreseen and planned for by oral agreement, but the planning is imperfect due to a desire to conceal the plan from IRS, will a court of equity perfect the plan for plaintiffs? Should a businessman be allowed to rely upon an oral agreement made with deliberate intention to conceal it from Internal Revenue Service? Should the directors of a public foundation be bound by an unknown conspiracy to conceal significant facts from Internal Revenue Service? These issues presented by the appeal were not passed upon by this Court.

V

Frustration. This Court affirms on the ground that the sale and lease were frustrated by a Revenue Ruling issued by the Commissioner of Internal Revenue in 1954. The Court cites *Borup v. Western Operating Corp.*, 130 F.2d 381, 386 (2d Cir. 1942), and *Dorsey v. Oregon Motor Stages*, 183 Or. 494, 194 P.2d 967, 971 (1948), for the proposition that where valid change of law pro-

hibited performance under criminal penalty and the promisor recognized and complied with the law, its failure to perform the prohibited act was excused. This Court recites that "the ruling denied" the anticipated tax benefits and "would make it impossible for the operating company to make the contemplated payments to the Institute."

The opinion makes clear that this Court is mistaken as to the effect of a Revenue "Ruling" which is not a "rule," order or law. It exercises no compulsion of any kind.

Borup and *Dorsey*, supra, involved executive and administrative orders with the force of law. This Court mistakenly assumed a Revenue Ruling to be the same. It is not—it is merely an adversary's opinion in another case which a taxpayer is not required to follow. In *Borup* and *Dorsey* the parties recognized and followed the executive orders. Here, plaintiffs refused to comply with the Ruling although the opinion misstates that the Ruling *denied* tax consequences and that *application* of the Ruling "rendered performance impossible." The Ruling *denied nothing*—it had no power to do so. It was *never applied* to this transaction and did not affect performance. Plaintiffs rejected it, and correctly asserted that it did not apply to them. The operating company continued through all the years to deduct rent for tax purposes (it was on the accrual basis) (Exhs. 566 to

576), and sellers paid tax on payments at only capital gain rates (Exh. 580). The opinion fails to note that plaintiffs were not intimidated by the invalid Ruling. It is based on a complete misunderstanding of the nature of a Ruling and its factual effect in this case.

The Court misstates the facts in saying that the consideration bargained for was $2,500,000 entitled to capital gain treatment. The Institute could promise nothing with respect to tax treatment. The contract contains no such condition. Nor could the monetary consideration be varied by parol evidence. *Coker & Bellamy v. Richey*, 104 Or. 14, 22, 202 Pac. 551, 204 Pac. 945, 204 Pac. 947 (1922); *Ramirez v. Ringo*, 202 Or. 1, 3, 271 P2d 657 (1954); *Elliott Contracting Co. v. Portland*, 98 Or. 150, 171 Pac. 760 (1918); *United States Nat. Bank v. Miller*, 122 Or. 285, 295-296, 258 Pac. 205 (1927).

> " * * * [A] purely money consideration mentioned in a written instrument, which is complete upon its face, cannot be amplified by parol evidence so as to ingraft into the instrument an additional executory or contractual consideration. * * * " *Marks v. Twohy Bros. Co.*, 98 Or. 514, 529, 194 Pac. 675 (1921).

The office of the judge is to ascertain what is contained in the instrument and "not to insert what has been omitted" (ORS 42.230). The court's conclusion

that the contract was not integrated and that additional terms of consideration could be shown by parol is in conflict with the Oregon statutes and decisions.

Conclusion. Since the court failed to pass upon several issues presented by the appeal, further examination is required. Analysis of these questions and the irreconcilable conflicts presented by the opinion will require re-examination of other issues. The tender conscience of the chancellor is not easily satisfied and in this case a rehearing is both appropriate and necessary to a full consideration.

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CERTIFICATE

I HEREBY CERTIFY that the foregoing Petition for Rehearing is, in my judgment, well founded and is not interposed for delay.

HERBERT H. ANDERSON
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